SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-1444

SHARON BLUM, *Petitioner*,

v.

COMMONWEALTH OF PENNSYLVANIA

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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COMMONWEALTH OF PENNSYLVANIA

Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

STATEMENT OF THE CASE

The Commonwealth adopts the petitioner's statement of the case as set forth in her Petition for Writ of Certiorari to the Supreme Court.

REASONS FOR DENYING THE WRIT

The decision in this case has not left a confusing and misleading precedent in Pennsylvania on any substantial questions under the Federal Constitution in the search and seizure field. Rather they were decided in accordance with the decision of Your Honorable Court in *Chambers v. Maroney*, 399 U.S. 42 (1970) and *Jones v. United States* 362 U.S. 257 (1960). And regardless of the Constitutionality of search and seizure, the items seized and ultimately offered into evidence constituted a minor part of the

Commonwealth's case and herein any error in this phase of the case is harmless.

Furthermore, there has not been great confusion and variation in the interpretation by the State and Federal courts in the decision of this court in *Preston v. United States*, 376 U.S. 364 (1964), and the subsequent cases of *Cooper v. California*, 386 U.S. 538 (1967); *Chambers v. Maroney, supra; Coolidge v. New Hampshire*, 403 U.S. 443 (1971). The cases cited by the Petitioner will be discussed in more detail later in the Commonwealth's brief, but concern themselves with three consistent independent categories of exceptions to the general rule requiring a search warrant to search an automobile: (1) the search was incident to a valid arrest; (2) there was probable cause for the search: and (3) the search involved an impounded vehicle which was being held for forfeiture.

Similarly, the decisions related to *Jones v. United States, supra*, have been remarkably uniform. The courts apply the general rule that in order to have standing the petitioner must be the owner or possessor of the property involved with the exception that if possession of the item seized is enough to convict the petitioner automatically has standing.

Finally, the *Muncy Act* does not unconstitutionally discriminate against women. The Act provides that women shall be given a maximum sentence only up to the maximum allowed by law. The lack of a minimum sentence does not discriminate against women, because they are immediately eligible for parole. They do not have to wait for a minimum to expire.

1. The warrantless search of an automobile based on probable cause does not violate Preston v. United States as interpreted by Chambers v. Maroney.

It is conceded that the search of the automobile in question was accomplished without a warrant. However, the search fell within several already defined exceptions

to the general rule that a search without a warrant is unreasonable.

There can be very little doubt that Detective Wagner had probable cause to arrest the defendant and her accomplice for robbery of the Crafton Cleaners. They were apprehended in a white Cadillac convertible with a black top, Pennsylvania license 449 46J at 6:59 P.M. on Route 413 coming from the area in which the robbery had occurred. The arresting officer had knowledge that a white Cadillac convertible with a black top had been used in a robbery in his township five days earlier. That Cadillac had a six item Pennsylvania license containing the first three digits 449 and ending in J. His investigation revealed that there was only one Cadillac convertible with license of 449 as the first three digits and J as the last letter in Pennsylvania. Furthermore, the Cadillac (which had to be the one seen leaving the cleaners for the reason stated above) contained the same number of occupants seen leaving the scene and the occupants matched the description of the perpetrators of the crime given out over the police radio.

At least the police had reasonable suspicion to believe that these two persons committed the robbery. See *Terry v. Ohio*, 392 U.S. 1.(1968). After the stop, they were taken to police headquarters where they were identified as the robbers. At this point, there can be no question that probable cause for the arrest existed. As a matter of fact, the Petitioner was formally placed under arrest at this point. Meanwhile, the car was being towed to police headquarters. It was not searched until after the identifications were made and the subjects were formally arrested.

Therefore, no matter how you structure the "arrest," at the time of the search the police had probable cause to believe the automobile had been used in the robbery and thus contain contraband and fruits of the crime.

Under the above facts, the trial court concluded that the search was valid as incidental to a lawful arrest (whether the arrest occurred at the stop or at the police station, *Kerr v. California*, 374 U.S. 23 (1964) because it

was substantially contemporaneous with the arrest. *Preston v. United States, supra*, is distinguishable from this factual situation just as it was in *U.S. v. Dento*, 382 F.2d 361 (3rd Cir. 1967), cert. denied 389 U.S. 944 (1967), rehearing denied, 389 U.S. 997 (1967). In *Dento*, the Court held that twenty minutes was not such a delay as to be unreasonable and the search was valid even though the automobile had been towed to the police station. (In *U.S. v. Mencke*, 11 Cr. L. 2038 (W.D. Pa. 1972) cited by defendant, the delay that was held to be unreasonable was one hour). In the instant case, the subjects were immediately returned to the police station so that they could be shown to the victims.

Each case must turn on its own facts. As the court observed in *Cooper v. California, supra:*

> "We made it clear in *Preston* that whether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case and pointed out, in particular, that searches of cars that are constantly movable may make the search of a car without a warrant a reasonable one although the result might be opposite in the search of a home, store or other fixed piece of property."

In the case at bar, the officers delayed the search in order that they could have the suspects promptly identified. Upon confirmation of Blum and Fisher as the robbers, the car was promptly searched as part and parcel of the same investigation. The defendants in *Preston* were booked prior to the search, whereas in our case, they were still being investigated. The events were part of a single continuum. As the court said in *State v. Wood*, 197 Kan. 241, 416 P.2d 729 (1966):

> "The question of reasonableness of a search must be resolved from the facts and circumstances of each particular case. Our view of the evidence in the instant

> case is that the arrest of the defendant, the removal of the automobile and its search were a series of events constituting one continuous happening. Under such circumstances, the search occurred substantially contemporaneous with and incidental to the arrest. The fact that defendant was not present did not prevent the search from being incidental to his arrest *(Crawford v. Bannan*, 336 F.2d 505 (6th Cir. 1964)."

The facts in that case were strikingly similar to our situation. The defendant was arrested in his automobile, he was taken to the station for questioning and his car was towed to the station. Immediately after the car arrived—twenty minutes after the arrest—the car was searched. Just as in *Wood*, the Court should conclude that the arrest, identification and search constituted one continuous event and, therefore, the search was incidental to the arrest.

For other cases discussing *Preston* and reaching the result that a search of an automobile is reasonable even if the car is taken to the station house if the search is part of a continuous happening, see *State v. Omo*, 190 Kan. 167, 428 P.2d 768 (1967); *Fuqua v. State*, 246 Miss. 191, 145 So.2d 152 (1962) and cert. denied 371 U.S. 709 (1963), reh. denied 373 U.S. 947 (1963); *Johnson v. State*, 247 Miss. 182, 145 So.2d 156 (1962), cert. denied 372 U.S. 702 (1963); *State v. Harvey*, 263 N.C. 816, 140 S.E.2d 544 (1965).

The validity of the search need not rest entirely upon the exception for a search incidental to a lawful arrest for in the interval between the decision of the trail court and that of the Superior Court of Pennsylvania, Your Court decided *Chambers v. Maroney*, 399 U.S. 42 (1970). The factual situation of the instant case is identical to that presented in *Chambers*. In *Chambers* the police stopped a car on the basis of a radio message which gave a general description of the automobile and the occupants wanted in connection with a robbery of a service station. In the instant case, the radio message gave a description of the automobile as a white Cadillac convertible with a black top

and described the two occupants. In both cases the car was stopped a short distance from the scene of the robbery. In *Chambers*, the car was stopped an hour after the robbery and in the instant case it was stopped only nine minutes later. In each the description of the occupants matched the description of the perpetrators of the robbery. The court in *Chambers* had no difficulty determining that a general description of an automobile and persons in the automobile being found in the vicinity of the robbery a short time later constituted probable cause for their arrest.

In both *Chambers* and the instant case, the occupants of the car were taken into custody and the car was driven to the police station where it was searched. In each case a revolver was located along with several other items during the course of the search, all of which were introduced at trial. A lengthy discussion of the opinion in *Chambers* would serve no purpose other than to further point out the similarities in the cases. The court concluded:

> "On the facts before us, the blue station wagon [white Cadillac convertible] could have been searched on the spot when it was stopped since there was probable cause to search and it was a fleeting target for a search. The probable cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless search of the car and the denial of its use to anyone until the warrant is secured. In that event there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained. The same consequences may not follow where there is unforseeable cause to search a house. *Vail v. Louisiana*, 399 U.S. 30. But as *Carroll, supra*, held for the purpose of the Fourth Amendment, there is a Constitutional difference between houses and cars."

Petitioner seeks to avoid the application of Chambers to the facts of the instant case be setting up a "straw man"

of conflicting decisions. A brief recitation of several of the cases cited by the Petitioner is sufficient to point out the invalidity of her thesis of conflict.

The cases that she cites as "apparently adhere[ing] strictly to precedent and consider[ing] *Chambers* applicable only where there is immediate danger to the safety of police or evidence do not so hold. In *State v. Wilson*, Ariz. 477 P.2d 242 (1970). *Chambers v. Maroney* was not even cited and the search question was not decided as there had been no pre-trial suppression motion. In *State v. Tosatta*, Ariz. 485 P.2d 556 (1971), the court sustained the search as being incidental to the arrest since it was at the scene of the crime and in the presence of the two defendants and was conducted as soon as they had been handcuffed and merely cited *Chambers* as an additional reason for granting the search. In *Mozzetti v. Superior Court*, Cal. 484 P.2d, p. 84, the search was held unconstitutional because no probable cause existed for the search. Similarly, in *U.S. v. Day*, 10 Cr.L. 2445 (6th Cir. 1972), the search was deemed unconstitutional for lack of probable cause.

Thus, the second groups of state and federal cases that are cited by petitioner for a broader interpretation do not conflict with the first group. Furthermore, cases such as *People v. Woods*, Colo. 485 P.2d 491 (1971), do not even apply as the search was constitutional because it was based on a validly issued search warrant. In *U.S. v. Young*, 11 Cr.L. 2058 (8th Cir. 1972), the search was upheld pursuant to *Cooper* eight hours after the arrest because the car was subject to forfeiture proceedings pursuant to 49 U.S.C. 783.

Chambers is distinguishable from *Preston* for the very reason cited in the *Chambers* opinion at p. 47: "In *Preston*, *supra*, the arrest was for vagrancy; it is apparent that the officers had no cause to believe that evidence of crime was concealed in the auto," whereas in *Chambers* and the instant case the police had probable cause to believe that robbers, carrying guns and fruits of the crime would be found wearing specific clothing in a specific auto, in short, they had probable cause.

2. The petitioner, who owned neither the property seized nor the automobile searched and who was not present at the scene of the search, has no standing to contest the search of the automobile.

In order that a party be successful in a Motion to Suppress Evidence, the applicant must be a victim of a search or seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of the evidence gathered as a consequence of a search and seizure directed at someone else. To establish standing the applicant must show that he was the owner or possessor of the seized property, or that he has a possessory interest in the premises searched, *Jones v. U.S.*, 362 U.S. 257 (1960). The requisite possessory interest in the premises is established if a person is legitimately on the premises, e.g., a guest or invitee. There is an exception when possession of the disputed evidence alone is sufficient to convict, e.g., narcotics, in that event the applicant automatically has standing, he does not have to show a possessory interest in the disputed item(s).

The petitioner begs the question of standing when she argues that she was legitimately on the premises searched. She overlooks the fact that she was not present or around the car when it was searched, but rather was in the police station at the time of the search and was, therefore, by definition not on the premises. The instant case is quite similar to *U.S. ex rel. Smith v. Reincke*, 239 F.Supp. 887 (1965), cert. den. 384 U.S. 993 (1965), where the police searched an automobile and found the murder weapon and various items of clothing. The car was searched without a warrant and the search was not incidental to the arrest. The defendant disavowed any knowledge of the items seized just as Sharon Blum has disavowed any knowledge of the gun, gloves and glasses in the instant case. The court observed, "the right to protection against an unreasonable search and seizure is personal and a defendant in a criminal case who claims no propriety or possessory in the

seized property has no standing to object to the method of seizure". (Citations omitted). Likewise, the court in *State v. Edwards*, 197 Kan. 164, 415 P.2d 231 (1966), reached an identical conclusion where a car belonging to one of three co-conspirators was searched after the three were in police custody and the items found were introduced against one of the passengers who was not the owner of the automobile. The *Edwards* court reviewed similar cases from many state courts and reached the conclusion that the search of the automobile was not an invasion of the defendant's constitutional immunity to unreasonable search and seizure as he claimed no interest in the goods seized and he was not the owner nor was he in possession of the automobile. See also *State v. Littlefield*, Maine, 213 A.2d 431 (1965); *State v. Hamilton*, 264 N.C. 277, 141 S.E.2d 506 (1965); *Head v. State*, 246 Miss. 203, 136 So.2d 619 (1962), cert. denied 371 U.S. 910 (1963).

Sharon Blum was not the owner nor did she have a possessory interest in the white Cadillac. It belonged to her co-defendant's mother. Furthermore, she did not own the seized items, a gun, gloves, and sunglasses. They belonged to her co-defendant. The burden is on the appellant to show she has standing to object. The cases cited by appellant in her brief are all distinguishable from our instant case. In most, the question of standing has not been raised and, in the remainder, the person aggrieved by the search was present in the vehicle at the time the search was conducted. Sharon Lee Blum has no standing to object to the search of the Fisher vehicle by virtue of being the owner of the seized items or the possessor of the search vehicle.

The Petitioner, however, further contends that she fits within the exception to the general rule that ownership or possessory interest in the premises searched is necessary to confer standing. Your Court in *Jones* held that when the petitioner has to admit ownership of an item in order to get standing to object in the search and at the same time possession of the item is enough to convict, that he is put on the twin horns of a dilemma. A dilemma which is un-

necessary. Therefore the Court held that if possession alone is enough to convict then the applicant automatically has standing to object to the search, to rule otherwise would be to permit the Government to have the advantage of contradictory positions as a basis for conviction. However, the Petitioner confuses the argument concerning the dilemma necessary to provide "automatic" standing and the possessory interest necessary to confer standing. In *Jones* the petitioner had two reasons that he had standing. First, that he was present in the apartment, and, second, that possession of the item alone was enough to convict. The Petitioner is not on the twin horns of a dilemma because possession of a gun, gloves and sunglasses does not convict a person of robbery. The fact that the evidence seized becomes very incriminatory when coupled with the testimony of Morey Fisher does not confer standing, for the test for the standing has never been whether the evidence is condemning. The test has always been whether the evidence is procured in violation of her rights against official evasions of her privacy and Sharon Lee Blum's privacy had not been invaded.

The Pennsylvania cases cited by the Petitioner are completely inopposite. In *Commonwealth v. Harris*, 427 Pa. 215, 239 A.2d 290 (1968), the car searched belonged to the defendant and therefore he obviously has standing to object to the search. *Jones v. U.S., supra*, was not even cited. In *Commonwealth v. Dussell*, 214 Pa. Super. 1, 248 A.2d 857 (1969), the question of the defendant's right to standing never arose because he was present in the car at the time of the search. In *Commonwealth v. Pinno*, 433 Pa. 1, 248 A.2d 26 (1968), the court merely discussed the question of whether an applicant waived his right to a suppression hearing by filing his petition after the time required by rule.

In *Mancusi v. DeForte*, 392 U.S. 364 (1968), also cited by Petitioner, the union official who had standing to object to the search of a joint office was present at the time the search was conducted and therefore had standing to object.

The cases cited by the Petitioner which allegedly illustrate that there is a split on the question of whether a

Dyer Act defendant has standing to object to the search of a car merely points up the Petitioner's error in contending that the Petitioner had standing. The first group of federal cases cited by the defendant are cases in which although the defendant did not have a ownership interest in the property, he had a possessory interest in it because he was present at the time that the search was made. The first group of state cases are also cases in which the defendant had standing to object to the search because he was present at the time of the search (whether or not he had an ownership interest in the property seized).

The second group of cases cited by the Petitioner are all cases in which standing was denied because the Petitioner neither had a possessory interest in the premises searched, i.e., was present, nor had an ownership interest in the items seized. In none of those cases was possession of the seized item alone enough to convict and therefore the applicant did not fit within the exception to the general rule.

The trial court properly determined that Sharon Lee Blum had no standing to object to the search. That decision was affirmed on appeal, Per Curiam. Furthermore, there is no confusion concerning the scope of the doctrine of standing and thus no need for the Court to review the instant decision.

3. Even if the court found that the evidence was unconstitutionally seized, the evidence constituted a very minor part of the Commonwealth's case, and if there be error, it was harmless.

Finally, even if the appellant was found to have standing and the search and seizure violated the appellant's Fourth Amendment rights, the error is harmless. *Chapman v. California*, 386 U.S. 18 (1967). Morey Fisher took the stand as a Commonwealth witness and admitted he was the person who entered the 7-11 store (the first robbery) and Crafton Cleaners with a gun while wearing sunglasses and gloves that were found in the car. He identified the gun

taken from the car as that which was used in the robbery. The sole question in the case was whether Sharon Lee Blum knew what Fisher was doing and was aiding in the escape as a "wheel man". Nobody questioned that there were two robberies. The evidence of the course of conduct indicating that she was a co-conspirator was overwhelming. She was a girlfriend of Fisher's and they had been discussing marriage. She was identified as the driver of a white Cadillac convertible at the scene of the 7-11 store. The white Cadillac left the Crafton Cleaners with its lights out, and proceeded down the road without lights even though she almost caused an accident. Both appellant and Fisher were apprehended together in the white Cadillac a short distance from the scene of the second robbery. The seized evidence was used by Fisher to illustrate his testimony of the hold-ups and not as part of the prime question of whether or not a conspiracy existed between the appellant and himself. When evidence from an illegal search and seizure is introduced at trial, it is harmless error if there is overwhelming independent evidence of guilt, *Commonwealth v. Gordon*, 431 Pa. 512 (1968).

Moreover, as Judge Beckert observed in his opinion denying appellant's motions:

> "It would be reaching an asinine result if an accomplice could verbalize through testimony that he had certain physical objects used by him in holdups, that he stowed the gun, etc., in the car driven by his partner in the crime thereafter, but could be prevented from identifying those objects at the time of trial. If this is the result strived for on behalf of the defendant Blum, then it would be the Commonwealth that would be placed on the horns of a dilemma."

The failure of the Commonwealth to produce the physical objects would cast doubt on the witness's credibility and the defense witnesses would be free to concoct any story about why they weren't presented, including that they never existed. The result would be more damaging in a

close case, as opposed to our case where the evidence of the prime question was overwhelming. The Commonwealth should be allowed to present testimony and exhibits when verified by the *actual users* of those exhibits (as opposed to persons who merely seized the exhibits to establish its case).

4. The Muncy Act, as amended, does not unconstitutionally discriminate against women.

The appellant has been sentenced to two and a half years in prison under the *Muncy Act*, Pa. Stat. Ann., title 61, §566. The Act provides that "the court in imposing sentence shall not fix a minimum sentence, but shall fix a maximum sentence as the court shall deem appropriate, so long as such maximum does not exceed the maximum term specified by law for the crime for which the prisoner is being sentenced". Two and a half years does not exceed the maximum for armed robbery (which is 20 years in Pennsylvania, Pa. Stat. Ann., title 18, §4705). Previously, women were sentenced to an indefinite term not to exceed the maximum allowed by law.

There is no unconstitutional discrimination against women in the amended *Muncy Act*. As the court observed in *Commonwealth v. Daniels*, 430 Pa. 642 (1968) at p. 647 in a footnote, "the privilege of a minimum sentence given to men under the Act of 1911 [Pa. Stat. Ann., title 19, §1057], may ultimately govern their release under parole. The issue is not in dispute, however, since the appellants technically became entitled to parole immediately upon their commitment to Muncy". Therefore, women are not being discriminated against. The problem that caused the court to declare the *Muncy Act* as unconstitutional was that women could always be re-incarcerated as technical parole violators until the statutory maximum had expired whereas men could be so re-incarcerated only during the period of their maximum sentence (which could have been less than the statutory maximum).

The *Daniels* court further observed "in this connection,

it is pertinent and appropriate to note whether a sentence is stated in terms of a minimum or maximum or is purely an indeterminant term, the maximum sentence is the real sentence," citing *Commonwealth ex rel. Carnela v. Smith*, 347 Pa. 495 (1943). The minimum is merely an administrative notice, the maximum is the only portion with legal validity. [The letter of November 18, 1966, from Miss Charlotte Cummings attached as Exhibit D to appellant's brief is not a part of the record in this case and should not be considered, and, in any event, it is not relevant because it concerns the period before the *Muncy Act* was amended and not the conditions as they presently exist.] Furthermore, the appellant will be given credit for the time already served, the allegations made by Petitioner concerning when she will be paroled if returned to Muncy are totally unsupported by the record and are mere speculation on counsel's part: she has not been unconstitutionally discriminated against because of her sex.

CONCLUSION

For the reasons stated above, the Commonwealth requests your Honorable Court to dismiss this Petition for Writ of Certiorari.

Respectfully submitted,

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